NATIONAL COUNCIL ON DISABILITY

An independent federal agency working with the President and the Congress to increase the inclusion, independence, and empowerment of all Americans with disabilities.

National Council on Disability
Comments to Federal Communications Commission
February 28, 1997

In The Matter of Closed Captioning of Video Programming
Notice of Proposed Rule Making, MM Docket No. 95-176

Introduction

The National Council on Disability (NCD) is an independent federal agency with a 15 member board appointed by the President and confirmed by the Senate. Our mandate is to advise the administration and Congress on public policy affecting people with disabilities. We appreciate the opportunity to submit comments on these proposed regulations.

For the estimated 25 million Americans who are deaf or hard of hearing, access to video programming is a key factor in educational attainment, career success, and social integration. Through careful design and enforcement of captioning and other accessibility policies, the Federal Communications Commission can play an instrumental role in dismantling barriers that have resulted in unemployment and isolation for many of our citizens. With the proportional aging of the nation's population and the natural accompaniment of hearing impairments, this public role is especially significant. We applaud the Congress and administration for specifying this objective in the Telecommunications Act of 1996 and hope that implementation will be as comprehensive and timely as possible.

(1) Implementation Schedule. We recognize that achievement of 100% captioning of new video programming will require a period of time. Accordingly, we accept the necessity for a phased-in schedule of implementation over a period of time, with milestones or benchmarks at intervals during the phase-in period to assure the steady, incremental progress necessary for success. While NCD favors the most expedited possible implementation timetable, we accept that eight years may, as a practical matter, represent the shortest period available for fulfilling the goal of Section 713(b) of the Federal Communications Act. To the degree that none of the concerns commonly raised about a captioning requirement would appear to be ameliorated by substitution of a ten year phase-in period, we urge that the proposed eight years be adopted. Were it the case that significant sectors of the involved industries could guarantee 100% captioning of new programming (or could

1331 F Street, N.W. ■ Suite 1050 ■ Washington, D.C. 20004-1107
(202) 272-2004 Voice ■ (202) 272-2074 TT ■ (202) 272-2022 Fax

guarantee substantial captioning of archival programming) under a ten year phase-in schedule, but be unable to make these commitments under the eight, then recourse to the longer time frame might be appropriate. In the absence of specific, unambiguous guarantees to this effect, and in the absence of any other basis for believing that opting for the longer period would eliminate the obstacles to universal captioning cited by various components of industry, the shorter implementation period appears adequate to meet the objectives of the statute.

Notwithstanding the superiority of an eight or a ten year implementation period, and bearing in mind that full implementation will require innovative practices and effort, the NCD questions why even so lengthy a period as eight years should be required for implementation. While the selection of any particular number of years is in a certain sense arbitrary, our long history with captioning, the wide dissemination of knowledge about and experience with captioning, the existence of a number of demonstrated techniques for captioning, and the awareness on the part of the industries in question that this requirement is mandatory, all lead to the conclusion that eight years represents a far more protracted period than should be needed by those who recognize the imperative of the law and simply get about the business of abiding by it. We believe that, on balance, three years ought to be sufficient for a smooth and effective transition.

Support for the notion that an eight year phase-in period is unnecessarily long can also be found in the Commission's own intention to exempt several classes of video programming from captioning requirements. To the degree that these exemptions appear to cover the chief programming categories in which unusual difficulty or expense can be feared, the difficulties in captioning what remains are commensurately reduced. Moreover, to the extent that the Commission has authority to grant petitions for exemption in cases where undue hardship can be demonstrated, institution of a shorter time period than contemplated by the NPRM need not result in any hardship for a program provider, in the unlikely event such hardship actually portends.

(2) Benchmarks. By prescribing the achievement of full closed captioning of non-exempt video programming in four increments (25% more of new programs after each two years), the Commission has sought to ensure that progress can be assessed during the eight year phase-in period. Such an incremental approach should prevent entities subject to the requirements from contending, or from realizing, only at the last minute that implementation is not proceeding smoothly.

We believe that the goals of bench marking could be further enhanced by requiring evidence of progress on an annual rather than on a biannual basis, however. We recommend that programming providers be expected to show some evidence of progress each year, aggregating to 25% each two years. In this way, difficulties could be identified even earlier, and the process toward complete integration of captioning could be made an even smoother and more effective one.

In this connection too, we fear that the stated benchmark levels may create some confusion. Although the Commission makes clear its expectation that those providers currently providing

more than 25% of their offerings with captions will continue to maintain their current levels of effort, we are concerned that the use of an across-the-board 25% initial requirement in the first two years may give rise to an undue delay in the pursuit of implementation on the part of those already exceeding that figure.

We would recommend instead that program providers be obliged to begin implementation at their current levels of captioning. Thus, a network that already captions 50% of its program offerings, having four benchmark periods to reach 100%, would be expected to have something around 62.5% of its programs captioned by the end of year 2, 75% by the end of year 4, 87.5% by the end of year 6, and 100% after year 8. Fortunately, the Commission has collected considerable data on the current levels of captioning by many major program providers, including broadcast commercial networks, standard and premium cable channels, and others. Those program providers not supplying such estimates should be allowed to specify their current utilization of captioning, with the required levels taking their own figures as the point of departure.

By allowing providers or owners of non-exempt programming to specify their own baseline levels of captioning, controversy or disagreement could be avoided. Inaction would also be avoided, since the obligation to increase the level would fall on each such provider or owner immediately. Thus, everyone would be addressing the challenging issues associated with implementation of full accessibility from the very beginning, thereby maximizing the likelihood that the needed resources and the innovative techniques integral to ultimate success will be developed or found.

(3) Exemptions. Pursuant to Section 713(d)(1) of the Act, the Commission is given authority to grant blanket exemptions either to certain classes of video programming or to certain classes of programming providers, in those instances where application of captioning requirements would result in economic burdens, including situations where the costs of captioning would outweigh the benefits of the practice. By declining to exercise its discretion in connection with the latter of these options, the Commission reflects its recognition that the grant to it by Congress of authority to issue such exemptions is not a mandate to do so. We urge the Commission to exercise this authority sparingly, particularly in light of the case-by-case, petition-based process for securing such exemptions available under Sec. 713(d)(3).

Precisely because the economic circumstances, audience needs, captioning sophistication and other circumstances will differ so broadly and unpredictably among programming providers, we believe it is difficult to conclude that, with respect to any particular category of video programming, a captioning requirement would be burdensome to all members of the class of video programming providers who might be subject to it. Therefore, the Commission should reconsider the option of making greater use of the petition process, including using it, rather than blanket exemptions at this stage, for clarifying what classes of programming would prove economically burdensome to all the entities making up the class of providers.

In this connection, the Commission may wish to consider the total amounts or percentages of programming time that its proposed exemptions would cover. While each of the currently

proposed exemptions seems small in itself, it could be that in toto, especially for certain providers, they will add up to a surprising proportion of minutes per hour, even when averaged over such time periods as the Commission may adopt as its unit for measuring compliance and progress.

(4) The Contracts Exemption. With respect to the exemption for contracts forbidding captioning, we applaud the Commission's intention to interpret this provision strictly. A requirement that the contractual proscription of captioning be explicit and specific, rather than merely implied or arguable, is appropriate. Without the requirement of explicit contractual language as a precondition for invoking the 713(d)(2) contract exemption, endless disputes, costly litigation and prolonged uncertainty are inevitable.

But some additional qualifications may also be in order, and can be implemented without in any way transgressing the sanctity of contracts between private parties. For example, contracts between affiliated organizations, or between organizations under common ownership or control, should perhaps not be viewed identically as contracts made at arms-length between unaffiliated entities. This is so whether the contracting parties were affiliated at the time the contract was made, or became affiliated, through merger or otherwise, at a subsequent time.

Where affiliation or common control gives rise to a situation where the power to enforce the contract or to modify it reside effectively in the same hands, the mere existence of the contract should not be determinative of obligations under Section 713. More broadly, programming providers claiming exempt status for particular programming by reason of contracts with unrelated parties should at least be expected to ascertain whether the provision remains critical to its author. It may be that such provisions were included as a matter of routine, without particular attention on the part of either party. It may be that the contract, especially if a long-term one, contains provisions for periodic redetermination of certain of its terms and conditions. And it may be, in light of the new law, that some organizations that once to regarded such anti-captioning clauses as key to their interests would now be prepared, if asked, to waive such provisions.

To the extent that such an approach, while fully respectful of the primacy of contracts, could narrow the range of video programming that is exempt from captioning requirements, it would not be unreasonable or impractical to ask program providers relying on the contract exemption to at least show that they have made good faith efforts to secure a waiver or modification of the anti-captioning language.

(5) Undue Burden. With regard to the "undue burden" standard as a basis for granting petitions for exemption under Sec. 713(d)(3), several issues need to be raised. We assume that where such petitions are filed, the exemption would be sought in connection with some particular class or category of programming that is not otherwise exempt. While no one can fully anticipate the range of factors that petitioners may assert in the 713(d)(3) context, it seems likely that, with the exception of situations where technical infeasibility of captioning, disruption of the program presentation, or other inappropriateness are claimed, the usual ground for the petition will be cost. Without disparaging the validity of such claims, the Commission should at least make two things

clear. It should indicate in its rules that petitioners claiming undue burden on account of cost are expected to demonstrate that they have fully reviewed the range of known captioning options to determine whether their estimates of cost are in fact accurate. The Commission should also make clear that where cost is the claimed ground of the exemption petition, it reserves the right to grant exemption either for the class of programming (e.g., live local news feeds) in question, or, in the alternative, to grant relief in the form of a reduction in the number of hours of such programming that must be captioned.

If this were done, and a partial exemption granted in this way, the high cost associated with making certain kinds of video programming accessible still might not preclude making some of that programming available. With a partial exemption, program providers and viewers would have an alternative to the all-or-nothing choice that might otherwise attach to decisions about the high-cost captioning of certain types of programs.

6) Allocation of Responsibility for Captioning. The Commission proposes to assign the responsibility for captioning of video programming to the entities that deliver that programming directly to consumers. This allocation decision is based on a number of plausible assumptions, including the greater accessibility of program providers than of program owners or producers to watchers; the probability that program providers will in many cases be able to accomplish via contract a reallocation of the captioning responsibility to program producers; and the difficulties associated with clearly identifying what entity should be responsible as program owner if the program provider is not.

We do not question the hypotheses and data underlying this decision, but we are concerned with a number of foreseeable problems that are likely to result from it. The ability of a programming provider to shift the responsibility for captioning by contract to a program producer or owner is likely to depend in great measure on the size and negotiating leverage of the particular provider. Although larger and more powerful programming providers will doubtless pay some premium to their suppliers for inclusion of captions in the programming furnished under their contracts, the probability remains that smaller entities, obliged to do the captioning themselves, will end up incurring a somewhat higher expense, program for program, for complying with the law. The Commission's suggestion that program providers can simply refuse to contract for the purchase of programming, if the programming is not captioned, may not be a viable one for many providers. The balance of economic power does not fall so clearly or uniformly at the exhibition end of the industry as to assure this leverage.

Moreover, insofar as such leverage does exist, it will tend to be concentrated in the larger and more powerful providers. Smaller, less powerful providers are almost certain to end up doing relatively more of their own captioning than their more powerful counterparts will. To minimize this paradoxical impact, the Commission should require that if a program owner, producer, syndicator or distributor agrees by contract to make particular programs or classes of programs available to some program providers with captions included, it must agree to do so for all other programming providers to which it sells, rents or otherwise makes available the same programs

or classes of programs.

Beyond issues of disparate contracting leverage, allocation of responsibility for captioning to program providers squarely raises the issue of needless duplication of effort. The Commission recognizes this and attempts to deal with it by applying and extending the rule of Section 76.606. But where, owing to the decentralization of the ultimate responsibility for captioning, much of it is inevitably destined to be done by program providers, often on a local or regional basis, it appears that more needs to be done to ensure that existing captions can be reused and shared to the maximum possible degree, thus reducing the incidence of numerous recaptionings of the same programming.

Accordingly, we recommend that the Commission consider the feasibility of establishing a registry of captioned programming materials that program providers could use as an element of their strategy to maximize the presentation of accessible video resources while minimizing the costs of achieving this goal. No legal obligation need be imposed upon the owners or holders of such materials to share them, but the existence of such a registry would give opportunity for positive market forces to develop and assert themselves around the most effective collaborative use of materials. Even where the secondary user of the program needs to reformat the captioning in accordance with editing requirements, the costs of such editing, as the Commission notes, are much less than those of captioning.

(7) Federal Support. The Commission asks for comments on whether those receiving federal funds to facilitate the production of captioned video programming should be subject to a shorter compliance time frame than others subject to the provision are required to meet. The Commission also notes the uncertainty surrounding the continuance or the levels of such funding in the coming years.

We believe that the receipt of federal subsidies should at least be taken into account in evaluating any individualized petition for exemption on undue burden grounds under Sec. 713(d)(3). To the degree that cost is among the factors taken into consideration in adjudicating such a request, it should be net cost, after these and other associated revenues are taken into account, that serves as the measure of any alleged burden.

(8) System-wide Approach. In connection with entities that provide video programming to the public over multiple cable channels or other outlets, the Commission asks for guidance on how its rules should be applied. Noting that such an entity, if it operated four outlets, could theoretically satisfy the year 2 benchmark requirement by making one of its stations totally captioned while offering none on the three others, the Commission asks whether such an approach should be permissible. Because the four programming outlets will not be identical (and will not necessarily even reach the same homes), we believe that permitting such a circumstance to occur would be highly inappropriate, serving as it would effectively, if unintentionally, to disenfranchise those audience sectors who preferred the programming on the three noncaptioned stations. Thus, whatever periods of time are adopted for compliance assessment, we believe that the 25% etc.

Requirements should apply to each channel. It may be that some variation should be permitted, such that at the end of year 2 20% of the offerings of one channel and 30% of another could average out to the required 25%, but any practices that tend to ghettoize or to unduly restrict the viewing options of captioning users should be firmly forbidden.

(9) Library Materials. The Commission has determined that no mandates should be imposed at this time regarding the percentages of previously exhibited video material that must be captioned, and that no time frames should be specified for the captioning of such material. While we appreciate both the reasoning and the interpretation of congressional intent giving rise to this forbearance, and while we join in the hope that the marketplace will meet the need for captioning of such materials, we would suggest that two important exceptions need to be made. The first of these relates to the definition of what are library materials. When a vintage film or other video program is "colorized," remastered or otherwise restored or modified in accordance with contemporary technology and tastes, does it remain archival in nature or does it become "new" programming? Whether it be considered a new program or not, the fact remains that in many such cases, the costs of captioning may represent only a relatively small proportion of, or minor addition to, the overall cost of modernizing the film. In such a case, the economic arguments against requiring its captioning may cease to be persuasive.

The second instance where an exception to the Commission's announced library policies is indicated involves situations where a particular video programming outlet or station includes in its programming a high proportion of vintage materials, or indeed markets itself in these terms. If, as may well prove the case, such a station presents little or no truly "new" programming, requiring it to caption some of the archival material it presents would potentially involve no greater cost than would be incurred by a station which mainly broadcasts non-exempt programming. Particular stations should not be allowed to avoid captioning obligations on the basis of the fact that all the video programming they broadcast is exempt. While Congress understandably did not want to create economic disincentives to the continued utilization and exhibition of our rich film and television history, neither did it wish to create incentives for reliance on pre-existing materials as a means of avoiding captioning requirements.

(10) The Complaint Process. We support the Commission's determination to utilize a complaint process, including efforts at informal resolution at the local level, for the settlement of disputes between consumers and program providers. But we would suggest two important modifications to the Commission's proposals in this regard.

First, although the Commission has declined to adopt non-technical standards for the quality of closed captions, it should be made clear that complaints will be accepted which allege levels of quality or accuracy so low as to effectively negate the value or utilization of such closed captioning as is provided. Even without guidelines for non-technical quality, substantial failure to caption effectively can be recognized where it occurs, and should be within the Commission's jurisdiction.

The second point about the complaint process which we wish to discuss relates to the burden of proof in the administration of the process. The Commission's proposal appears to suggest that the burden of proof lies with the complainant. While that is appropriate in principle, the ordinary citizen will typically be in no position to produce program logs, transcripts, video tapes or other documentary proof of alleged violations. Without shifting the burden of proof to respondents, it should be made clear that where allegations are of such a nature as to require information held by the video program presenter for their resolution, the program provider must supply the needed records. To put this in traditional, well-understood legal terms, once a complainant meets the threshold requirement of ascertaining a creditable prima facie claim, the respondent must come forward with the records and documentation which alone can clarify the underlying facts.

Conclusion. Tremendous progress has been made in closed captioning over the past twenty years. With the impetus of the new law and the oversight of the Commission, this progress can be sustained. With the cooperation and good faith of all those involved in the work, the day may soon be at hand when Americans with hearing disabilities will no longer be denied access to the information delivery systems that are increasingly at the center of our society and culture. The Commission is to be commended for its efforts, under law, to bring this day closer.